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Opinion following order recalling remittitur and vacating prior opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. EMERY ALLEN, Defendant and Appellant.	C071390 (Super. Ct. No. 10F00209)

In a tragically familiar sequence of events an encounter between rival gangs, which began when one gang invaded the territory of the other, led to an exchange of gunshots. A gang member was hit. A jury convicted defendant of attempted murder and found the offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)); that defendant personally used and discharged a firearm (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b), § 12022.53, subd. (c)), which

proximately caused great bodily injury (Pen. Code, § 12022.53, subd. (d)). The jury also found that defendant was a principal in the attempted murder of the victim when a principal personally used and discharged a firearm, which proximately caused great bodily injury. (Pen. Code, § 12022.53, subds. (b), (c), (d), (e)(1).) The trial court sentenced defendant to the midterm of 7 years for attempted murder with a consecutive sentence of 25 years to life for causing great bodily injury as a principal in the attempted murder. The 10-year sentence on the gang enhancement was stayed in the interest of justice.

Defendant appealed. We affirmed the trial court judgment. The Supreme Court denied review and the remittitur issued. However, nine days before issuance of the remittitur the Legislature passed and the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620), which amended the Penal Code to permit sentencing courts the discretion to strike firearm enhancements, a discretion the court did not have when sentencing defendant. Defendant filed a motion to recall the remittitur to permit supplemental briefing on the applicability of Senate Bill 620 to his appeal. We granted the motion, vacated our original opinion, recalled the remittitur, and solicited supplemental briefing.

Having considered the supplemental briefing, in which both parties agree remand is appropriate to permit the trial court to exercise the discretion afforded by Senate Bill 620, we now reissue our original opinion affirming the judgment, with the addition of part V and a modified disposition, as set forth below:

Defendant's conviction of attempted murder arose from a gang-related shooting. Gang cases are rarely the neat exemplars of criminal prosecutions found in trial practice textbooks. The gang vernacular, despite its origins in mainstream English, can be nearly impenetrable without translation. So also, the motives and impulses that induce gang members to commit acts of violence often require the insight of experts to understand. And the atmosphere of violence and intimidation that exists in the neighborhoods that

gangs inhabit is rarely conducive to a free exchange of information between victims, witnesses, and law enforcement authorities. Witnesses are not always eager to testify; the excitement of the moment affects memories and perceptions. Thus, in this case, conversations between gang members, though spoken in English, require translation. Experts must help to make sense of what happened, and the two key eyewitnesses, both children concerned with being labeled snitches, were reluctant reporters of what they saw.

The prosecution's case relied greatly on the testimony of L.A., an 11 or 12 year old who was working on his bicycle when an argument between gang members quickly devolved into a shooting that left Junius Winters hospitalized with a gunshot wound. L.A.'s account of the events, and in particular his identification of defendant as the perpetrator, was attacked at trial and is a central focus of this appeal. His testimony is not the clear and unwavering description of criminal conduct that a prosecutor might wish or a fact finder would find reassuring. He was subject to withering cross-examination. His memory of the events failed him at trial. His visual acuity was suspect. Another purported eyewitness identified a different suspect as the shooter.

And yet the jury believed him and, in reliance on his testimony and other evidence, convicted defendant of the attempted murder of Junius Winters, and found true various gang and firearm enhancements.

We will conclude that, for all its weaknesses, the testimony provided by L.A., along with other supporting evidence, including admissions in text messages sent to others following the shooting, is sufficient to support the jury's verdict. As the law commands, we will defer to the jury's assessment of L.A.'s credibility even as we recognize certain flaws in his recounting of the events that evening. We also reject defendant's challenge to the gang enhancement.

FACTUAL BACKGROUND

The shooting on September 15, 2009, that gave rise to the present case occurred on Nedra Court (aka the Trap) in Sacramento, where a local gang, Gunz Up, reigned supreme. Antoine Jackson, a resident on Nedra Court and a relative of defendant, belonged to the Guttah Boyz gang. He explained that Guttah Boyz did not get along with Gunz Up. Defendant, known in the neighborhood as "Buddha," along with Little Diddy, Little Gunz, Isaac, Isiah, and Neem, were all members of Gunz Up. Despite the rivalry, Jackson lived peacefully on Nedra Court because defendant gave him "a pass," as he did for another Guttah Boy, Jerrin Jones. Other Guttah Boyz would visit Jackson and/or Jones at Nedra Court.

Just before the shooting, Jackson saw Jones arguing with defendant and his friends about Jones's invitation to other Guttah Boyz to visit while so many members of Gunz Up were assembled. Jackson testified there were about six guys standing around with dreads. Defendant tried to dissuade Jones and told him if Guttah Boyz members came over he could not guarantee Jones's safety. He heard Jones's mother say, "If you're gonna shoot him, you better shoot me first." He never heard defendant make any threats toward Jones.

In a pretrial interview, Jackson stated that he believed Jones was going to call, or did call, "Town June [Junius Winters] and them," other members of the Guttah Boyz, and tell them to come over because Gunz Up members had threatened to shoot him**.** Jackson went into his residence before the shooting began, though after the shooting he was blamed for setting up an ambush on the Gunz Up members.

Junius Winters and others came over. Winters became the victim of the shooting that ensued. He was taken to the emergency department of Kaiser South Hospital in a tan and gray Cadillac. He had been shot in the chest, resulting in two punctured lungs, and needed assistance breathing. Gunshot residue was found on his hands and was consistent

with Winters having fired a gun or having been around a gun that was fired. Defendant was jointly tried with Winters, although they had separate juries.

Eyewitness Accounts

There were many people out and about in the Trap on Nedra Court during the moments leading up to the shooting. However, only two purported eyewitnesses, both children, provided their accounts to the police. A.M. was 13 at the time of the shooting, and L.A. was 11 or 12. A.M. was outside playing in front of her house and L.A. was across the street working on his bicycle. Both were reluctant witnesses, expressing concern about snitching, and their memories had faded during the years that intervened before the trial. Their accounts differed.

Two days after the shooting, a detective with the Sacramento Police Department interviewed A.M. A.M. offered the more complete description of the pertinent events. She told the detective that gang bangers lived on her street. A.M. overheard parts of an argument involving defendant and others she could not identify. While she could not provide many details, at trial she testified that defendant attempted to persuade the others not to bring members of a rival gang into the neighborhood while a group of his friends was there. She did not hear defendant threaten anyone. Within 10 to 30 minutes, however, she saw nine or 10 gang members wearing hoodies with their hoods up. She described how the outside gang bangers "tried to be sneaky" and looked "guilty" as they hopped over a broken fence at the back of the complex and ran up to her house. She believed the invading gang bangers to be "G Parkway or Stars" and the bangers who lived at her complex to be "Guns." "[T]he Guns and most other gang bangers don't get along." She knew there was going to be a shootout.

A.M. saw two people with guns, one from each gang. Two brothers who looked like twins to A.M. both wore dreadlocks, but only one of them had gold tips. They were members of Guns. She explained that it was the brother without the gold tips who was holding a gun. He was wearing a black hoodie with blue jeans, was about five feet four

inches to five feet six inches tall, and was "kind of like skin and bone." She described the gun as silver and it looked like a police gun. She also saw a Stars guy walk up with a gun under his shirt. He was light skinned, about 18 or 19 years old, and was wearing a grey hoodie with white jeans.

At trial A.M. initially denied having ever seen any of the gang members before, but after being reminded of her obligation to tell the truth she indicated she had seen two of them before; "they used to hang around the house." She recognized at least two of the approaching gang members and saw two of them with what appeared to be guns. She knew there was going to be a shootout. She heard one of the Gunz Up members say "Oh, shit" and saw one of the twin brothers reach for his gun, and defendant and the Gunz Up guys took off running in the opposite direction. Frightened, she ran into her stepmother's house for safety. She heard 10 to 11 gunshots coming from all directions, but because she was in the house during the shootout, she did not see anyone shoot.

After the shooting stopped she went back outside and saw defendant with the brothers get into a gold Cadillac and drive off. She had seen the brothers drive the Cadillac in the past.

The detective showed A.M. a photograph she recognized as Buddha, but she never saw him with a gun. However, her response to the questions about defendant posed by the unidentified female officer reveals A.M.'s reluctance to cooperate in the investigation. After being shown the photograph, the following exchange occurred:

"Unid Female 1: Alright. Um you ever seen this guy out here before?

"[A.M.]: Yeah.

"Unid Female 1: Who's that?

"[A.M.]: What?

"Unid Female 1: Who is that?

"[A.M.]: (Unintelligible) at.

"Unid Female 1: What's his name?

"[A.M.]: Ah shit.

"Unid Female 1: I know you know who it is. I can tell by the look on your face.

"[A.M.]: I don't have to tell you the name.

"Unid Female 1: Is he the guy that had the gun?

"[A.M.]: No.

"Unid Female 1: No. He didn't have the gun.

"[A.M.]: No. (Unintelligible) none whatsoever.

"Unid Female 1: What's his name? If he didn't have a gun then it doesn't matter, right?

"[A.M.]: No.

"Unid Female 1: Okay. So what is his name?

"[A.M.]: I don't wanna say it.

"Unid Female 1: Huh? Why is it a hard part?

"[A.M.]: 'Cause if I give up the name. It's - it's on me, everything's on me.

"Unid Female 1: No it's not on you 'cause there's a whole lot of other people that saw what happened. Is this guy Buda?

"[A.M.]: (No response heard).

"Unid Female 1: That's Buda. Do you know what his real name is?

"[A.M.]: No.

"Unid Female 1: No. You just know him by Buda?

"[A.M.]: Yeah.

"Unid Female 1: But he's not the guy that you saw with the gun?

"[A.M.]: (Unintelligible)."

A.M. did not want to testify at trial because she did not want to have "problems." She described problems as fighting and snitching. She defined snitching as "telling what [somebody] did bad." She could not remember the neighbors who were outside when the shooting occurred because "I don't know them like that."

At the time of the shooting, defendant lived next door to her and helped her mother with chores. Her testimony was consistent with the statement she provided the detective two days after the shooting. She reiterated that she saw one of the brothers pull out a gun when the shooting started, but she did not see defendant hold or shoot a gun.

L.A. gave his first statement to the police about 45 minutes after the shooting. L.A. told Officer Keri Woolery that while he was working on his bicycle across the street, he saw a group of about 10 people, including both males and females, and heard them arguing. He heard one of the males state that he was going to take out his gun and shoot someone, but another male insisted, "You can't. My mom is home." The participant who threatened to shoot then pulled out a gun and fired five or six shots. The shooter appeared to L.A. to be in his late teens or early twenties, was about six feet tall, had a skinny build, and had short hair that was shaved. The shooter ran with a few others to a brown Cadillac and sped away. As soon as the shooting began, L.A.'s mother demanded that L.A. come inside their unit. He paused a few seconds before complying.

The next day he spoke to Detective Sheila Berquist and described a different person. The shooter had long dreadlocks, which L.A. described as "Medusa hair." According to L.A., the shooter was the only person with dreads. He told the detective that his nine- or 10-year-old friend, Nathaniel, referred to the guy with "Medusa hair" as "Buddha," a frequent visitor to Nedra Court. At first, L.A. said Buddha was not the guy he had seen with a gun. Detective Berquist asked him, do you know what Buddha looks like? And he responded, "No, but I know someone who does."

The detective then showed L.A. a single photograph of whom she believed to be Buddha, and L.A. responded, "I think that's Buddha." She did not show him a photo lineup. But then his story changed, and in this version, Buddha did fire four or five shots from what L.A. described as a revolver. According to L.A., the gun did not look like the detective's semiautomatic handgun. L.A. specifically stated that the gun he saw held eight rounds.

Detective Justin Saario interviewed L.A. again two months later. He began the interview by summarizing what L.A. had purportedly told Detective Berquist. He did not ask him any questions about the description L.A. gave of the shooter on the night of the shooting or the discrepancies between the description and Buddha's appearance. L.A. admitted he was scared. Detective Saario reassured him that nothing would happen; the police would not let anything happen to him. It appears as though Detective Saario was helping L.A.'s parents to relocate, and he offered his continued assistance to the family. L.A. confirmed that he believed Buddha was the shooter. He also confirmed that A.M. threatened to beat him up if he said anything about what he had seen.

At trial, however, L.A.'s testimony was much more tentative. Indeed, he backtracked or simply contradicted many of his earlier statements. He could not identify defendant at trial because he could not remember what his face looked like. He testified that he did not really know Buddha but admitted that he hung out with friends who did. He did not know if defendant lived in the neighborhood. Contrary to his earlier statement, he testified that the gun was not a revolver, but he could not remember what kind of gun it was. He admitted that he had first told Detective Berquist that he had not seen defendant with a gun, and it was only after she showed him the picture of defendant that he told her it was Buddha who had the gun. He never saw anyone coming over the fence, nor did he see a group approaching wearing hoodies with the hoods up. He confessed that he was afraid of testifying.

On redirect, the prosecutor asked him to explain why he first told the detective Buddha was not the shooter and then told her he was. He said he did not remember what happened back then. But L.A., when prompted, said he would not say Buddha was the shooter if he did not believe that's what he saw.

Doubts were raised at trial concerning L.A.'s vision. Though he never told the police he had problems with his vision, he could not read numbers on a screen only 20 feet away from him. He testified, "I can't see from far," though he claimed to be able to

identify a shooter and the type of gun he shot from across and down the street. He testified that he needed glasses, but he was not wearing glasses at the time of the shooting.

Gang Experts

The prosecution portrayed the shooting as only one battle in a widespread and brutal war between gangs and subsets of gangs, and subsets of subsets of gangs affiliated with other gangs, during a two-year period between 2008 and 2010. In the killing fields of South Sacramento during this period, the prosecution argued there were 26 senseless shootings. Detective Saario, the prosecution's gang expert, attempted to document this narrative.

Detective Saario provided an historical account of how and why the Gunz Up gang began. Defendant was a validated member of Gunz Up, and the victim, Winters, was a member of Guttah Boyz. At the time of the shooting, the two gangs were enemies. A year before the shooting, Quincy Washington, a member of Gunz Up and a friend of defendant, was found in possession of a videotape of Guttah Boyz members, including Winters, disrespecting the Gunz Up gang.

Detective Saario offered testimony to support the prosecution's burden of proving the primary activities of the gang and a pattern of criminal conduct. He testified that the primary activities of the Gunz Up gang are residential burglaries, weapons possessions, shootings, and assaults with a firearm. Specifically, he testified that on December 9, 2008, Dionte Brown, a Gunz Up member, was driving a stolen vehicle with another Gunz Up member as a passenger when he was stopped. He admitted he had stolen the vehicle and stated that he obtained the loaded nine-millimeter firearm during a residential burglary.

The detective also testified that the shootout on Nedra Court involved several Gunz Up gangsters, including defendant, Quinton Washington, Quincy Washington, and

Allen Oliver. He described another shootout involving the Washington brothers and Oliver that occurred five days later.

In response to a hypothetical from the prosecutor mirroring the facts in this case, Detective Saario opined that such a hypothetical shooting would be for the benefit of the Gunz Up gang. The gang benefits by defending what it deems to be its territory and maintaining a level of respect.

During cross-examination by the defense, the prosecution's expert acknowledged that of the 26 shootings involving the so-called war between a host of gangs, only three involved the Gunz Up gang as the aggressors, and one of those was after the Nedra Court shooting. Defendant had not been present or involved in any of the other shootings.

The defense's gang expert disagreed with the prosecution's expert's opinion that the shooting was for the benefit of the Gunz Up gang. In his opinion, a rival gang ambushed defendant at his home. Even assuming those who resisted that ambush were gang members, had they been killed, their actions could not be said to be for the benefit of the gang. It would be a "circular analysis" to say that if they survived, it was for the benefit of the gang, but if they died, it was not for the benefit of the gang because they were killed.

Text Messages

The prosecution introduced a series of text messages sent to and from a phone number associated with defendant on the day of the shooting and for a few days thereafter. We describe the messages in some detail, providing, where necessary, translations by the prosecution's second gang expert, Detective Scott MacLafferty, who testified in rebuttal.

While it is true that text messages cannot necessarily be attributed to the person who owns the phone, here there was no evidence to cast doubt on the fact that defendant was receiving and sending the texts under one of his pseudonyms, Young Jude. In the hours and days following the shooting, defendant was a prolific texter. They began less

than two hours after the shooting at 6:01 p.m. on September 15, 2009, wherein the texter identifies himself as Jude. Three hours later, Young Jude texts, "Nah why we get n a shoot out blud." In a text to Quinton Washington shortly thereafter, he wrote, "Kealn an twon june got whop." (Translation: "Key Lynn and Towne June got shot.") Approaching midnight, defendant texted, "Kus i jus got n a shoot." And shortly thereafter, he added, "shoot out."

Just after midnight, defendant wrote: "Whoy we bus twon june an anter niga they kame threw tha trap busin bt we poped two of they nigaz." (Translation: "[W]ow, we shot Towne June and another person. They came through the Trap, which I know to be Nedra Court, bussin', which means shootin', um but we popped, which means but we shot, two of, of them.")

A text message to defendant reads, "About the water bolloon games i font out who got wet wit one." (Translation: "[I]t's a cryptic way of saying, hey, about that shoot-out, I found out who got hit.") And the answer was Junius Winters. Another text to defendant stated, "Lol lol lol lol lol shit it was so hot yesterday he wanted to get wet." Defendant's response was: "Lol on tha gang we had ta super soak dat boi now watch me yooou lol." (Translation: "We had to shoot 'em.") The "tag changed to W fleckem -- fuckem."

Defendant later wrote, "U got sum 40 bullets." The response: "Hell na." Defendant wrote: "O we fina rock to tha tra." (Translation: "[T]hey're lookin' for some .40 bullets that -- and that they're looking for retaliation or it could mean that they're lookin' for -- to go find somebody.")

But after a few days, defendant suspects that the police are tapping their phones. Defendant wrote, "Wat they tawken bou Fuck u pigz," having changed his tag from "fuckem" to "fuck u pigz." Defendant instructs Quincy Washington to "Change yo number." Diddy told him, "[T]hey tapen shyt." Defendant was defiant, writing, "i aint teln them pussy ass crackaz shyt str8 lyk dat."

The text messages then turned to the subject of guns. Defendant received a text saying, "I know s0 we good niggas jus need 2 get they artilery up call that nigga neemoy let um kn0 shyt koo s0 that nigga can stop trippin cus we still need them thangs." (Translation: "So tell that guy to be cool and to kind of chill out because we still need the guns.") Defendant remained confident, responding, "I nw.im nt worid bou dat shyt real nigaz dnt fold unda presher." He wrote to Quincy Washington: "Dis shyt real so if niggaz aint rock 105 percent im taken nigaz off we n to deep now."

Finally, someone wrote to defendant, "U shot town june." He replied, "Lol is dat wat they sayin wow I aint seen nun of them nigaz bt if they wana give me that fame din aite lol."

During cross-examination, defense counsel asked the expert to explain some text messages he did not discuss and to consider alternative interpretations of those he did. For example, defendant wrote, "They think i shot sumbody." The response was, "U didnt did u?" and defendant then wrote, "Naw." (Translation: No.) A second exchange indicates that defendant did not quite understand why he would be questioned. He received a text message reading, "Yup they lookin for u they want to question u." And defendant responded, "For what."

There were also text messages the expert conceded suggested that Gunz Up needed guns and ammunition. Quincy Washington wrote, "I kno s0 we good niggas jus need 2 get they artilery up." The expert agreed that the text suggested that they did not have any weaponry beforehand and they still need it. Similarly, defendant wrote, "U got sum 40 bullets." The expert agreed that the question suggested defendant was in need of ammunition.

Defendant

At the time of the shooting, defendant was 20 years old and his "baby mama" was pregnant with his baby. He was unemployed, but according to his mother and sister, he helped his family and elderly neighbors with chores and errands. With the exception of a

minor offense when he was a juvenile, he had no prior record. No one who testified had ever seen him with a gun.

Defendant testified he was a member of Gunz Up, but he joined when it was a rap group and he did not consider it a gang. His close friends with whom he associated were validated members of Gunz Up and he was photographed on many occasions with Gunz Up gang members throwing gang signs.

By some accounts, defendant was attempting to keep the peace on the day of the shooting. In a heated argument, he attempted to dissuade his cousin from inviting his "Guttah Niggers" to Nedra Court, where Gunz Up members were gathered. The prosecution urged the jury to infer that defendant and/or his friends had threatened the Guttah Boyz, but the prosecution's gang expert admitted there was no direct evidence Gunz Up members had threatened anyone.

The Verdict and Sentence

The jurors found defendant guilty of the attempted murder of Junius Winters. They also found the following enhancements true: (1) the attempted murder was for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)); (2) he personally used a firearm (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)); and (3) he discharged it (Pen. Code, § 12022.53, subd. (c)), which proximately caused great bodily injury or death (Pen. Code, § 12022.53, subd. (d)). In addition, the jurors found that defendant was a principal in the attempted murder of Winters when a principal personally used and discharged a firearm, which proximately caused great bodily injury. (Pen. Code, § 12022.53, subds. (b), (c), (d), (e)(1).)

The trial court sentenced defendant to the midterm of seven years for attempted murder with a consecutive sentence of 25 years to life for causing great bodily injury as a principal in the attempted murder. The 10-year sentence on the gang enhancement was stayed in the interest of justice.

DISCUSSION

I

Sufficiency of the Evidence

Defendant argues the evidence is insufficient as a matter of law to sustain the finding of attempted murder and his conviction constitutes a denial of due process. The legal question, according to defendant, is whether, upon review of the entire record in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Here the evidence is insufficient because A.M. identified another person as the gunman. L.A.'s identification, on the other hand, was incredible and unreliable because his initial description of the gunman did not resemble defendant, and L.A.'s vision problems raised serious questions about his ability to even see what he claims to have seen. Moreover, his identification of defendant is undermined by the inherent "vagaries" of eyewitness identification leading to miscarriages of justice caused by misidentifications, all of which is well documented.

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 [61 L.Ed.2d 560].) It is fundamental that evidence will be deemed sufficient to support a conviction where, upon review of the entire record, it is found to be reasonable, credible, and of solid value. (*Id.* at pp. 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) "In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) A defendant "bears an enormous burden" when challenging the sufficiency of the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) "It is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a

criminal conviction. [Citation.] ' "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" ' [Citations.] Further, a jury is entitled to reject some portions of a witness' testimony while accepting others. [Citation.] Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623; accord, *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

We find nothing physically impossible or inherently improbable about L.A.'s identification of defendant in this case. His vision problems may have affected his ability to read letters or numbers at a distance, but there is no reason to doubt his ability to recognize defendant, a person from the neighborhood with whom he was already familiar, and to testify that defendant fired a weapon four or five times. True, his early description deviated from his ultimate identification of defendant as the shooter, but he assured the jury that he would not say Buddha was the shooter if he did not believe that is what he saw.

It was for the jury to decide whether his later description is credible or not in light of all of the circumstances impinging on L.A.'s veracity and accuracy. It is not for us to find his testimony inherently incredible and unworthy of consideration because earlier, in the heat of the moment, following a shooting, and in a setting where "snitches" are held in disrepute, this 11 or 12 year old offered a different description.

As for defendant's comments on the value of eyewitness testimony, we only note that defendant made no effort to explore this issue at trial through expert testimony and related jury instructions. We cannot find L.A.'s testimony weak and incredible based on

generalizations and references in cases to snippets from academic studies on the dangers of identification testimony.

While defendant insists that he was a peacemaker and walked away from the violent events on Nedra Court, his text messages to others paint a different picture: they show a jubilant gang member, gleefully relating news about the evening's events. Whatever role he may have played as peacemaker earlier in the evening and whatever courtesy he may have extended to Guttah Boyz Jackson and Jones, no peace or courtesy was extended to the two Guttah Boyz they "popped," including the victim in this case. To suggest that the texts affirm defendant's innocence is to strain the meaning of the language used.

Defendant correctly notes the weaknesses in L.A.'s testimony. But those weaknesses were matters for the jury to consider. Collectively, the evidence presented by the prosecution was of sufficient force to support the jury's verdict.

II

Firearm Enhancement

We requested the parties to file supplemental briefs on the issue of whether the jury's true finding on the Penal Code section 12022.53, subdivision (d) allegation was supported by sufficient evidence.

The cited provision reads as follows:

"(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (Pen. Code, § 12022.53, subd. (d).)

As discussed, there is ample testimony that defendant discharged a firearm during the events that led to the victim's injuries. That the victim suffered great bodily injury is

not disputed. The question is whether defendant's discharge of a firearm "proximately cause[d]" the injury. As defendant recognizes, proof of proximate cause does not require the prosecution to prove defendant personally fired the weapon that discharged the harm-inflicting bullet. (*People v. Bland* (2002) 28 Cal.4th 313, 335.) Personal *infliction* of the injury is not required. Rather, proximate cause is correctly defined thusly: "A proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred." (*Ibid*.) Accepting this definition, defendant insists the evidence does not support a finding that defendant proximately caused the victim's injuries. "The evidence merely shows that multiple shots were fired from at least two handguns and Winters was struck by a single bullet."

It is true that while the record suggests multiple firearms were fired it does not disclose the order in which they were fired, which firearms caused the injury, or link a particular handgun to its shooter. But the missing information is unnecessary to a determination of proximate causation if the available evidence shows the defendant's act "set[] in motion a chain of events that produce[d] . . . the great bodily injury." (*People v. Bland, supra*, 28 Cal.4th at p. 335.) L.A.'s testimony established defendant fired a pistol and when the fusillade of shots ended seconds later, the victim had been hit. The defendant in his texts took credit for the shooting. The missing details identified by defendant do not preclude the jury's determination that defendant and perhaps others set in motion a chain of events that produced the victim's injury. The evidence supporting the enhancement was sufficient.

III

Gang Enhancement

Defendant challenges on three grounds the 10-year gang enhancement he received: (1) the prosecutor did not introduce sufficient evidence that Gunz Up engaged in a pattern

of criminal gang activity; (2) the prosecutor relied on gang conduct that occurred after the Nedra Court shooting; and (3) the trial court failed to instruct sua sponte on the elements of the two predicate offenses the prosecutor argued constituted a pattern of criminal gang activity. It certainly is true, as defendant suggests, that throughout the trial the prosecutor focused not on the Nedra Court shooting, but on the larger so-called "war" between African-American gangs and repeatedly directed the jury's attention to the 25 other shootings, none of which involved defendant and 14 of which occurred after the Nedra Court shooting. It is also true that the gang expert's testimony was at least as vague as the testimony found insufficient in *In re Nathaniel C.* (1991) 228 Cal.App.3d 990 (*Nathaniel C.*) and *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*) in describing most of the other gang shootings that may, or may not, have involved Gunz Up. Nevertheless, we must affirm the enhancement because the evidence squeaks by the substantial evidence test, the prosecutor's war arguments did not specifically pertain to proof of the gang enhancement, and the error in failing to instruct on the elements of the predicate offenses is harmless beyond a reasonable doubt.

Pattern of Gang Activity

Penal Code section 186.22, subdivision (d) provides for enhanced punishment for any misdemeanor or felony committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." A "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e) [of section 186.22], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Pen. Code, § 186.22, subd. (f).)

Under the gang enhancement statute, therefore, the prosecutor must prove three essential elements: "(1) that there be an 'ongoing' association involving three or more participants, having a 'common name or common identifying sign or symbol'; (2) that the group has as one of its 'primary activities' the commission of one or more specified crimes; and (3) the group's members either separately or as a group 'have engaged in a pattern of criminal gang activity.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1222.) The criminal acts enumerated by the statute include murder, robbery, burglary, weapons possession, assault with a deadly weapon, and other felonies. (Pen. Code, § 186.22, subd. (e).)

Defendant's argument conflates elements (2) and (3). He argues that the evidence is insufficient because the prosecutor "did not establish that Gunz Up's 'primary activities' included the requisite offenses, and thus the prosecution did not establish that Gunz Up gang members engage in or have engaged in a pattern of criminal gang activity." We must consider not whether Gunz Up's primary activities constitute a pattern of criminal gang activity but whether there is sufficient evidence to support each element. While the proof often, if not always, overlaps, the prosecutor need only prove that one of the gang's primary activities is the commission of an identified crime but then must also present substantial evidence of a pattern of criminal gang activity that includes "two or more incidents, each with a single perpetrator, or by a single incident with multiple participants committing one or more of the specified offenses." (*Nathaniel C., supra,* 228 Cal.App.3d at p. 1003.)

Defendant lists, and the Attorney General ignores, a number of vague references gang expert Detective Saario made to incidents he believed demonstrated that Gunz Up is a criminal gang. The prosecutor's belief that Gunz Up was involved in a greater war does not elevate the expert's vague descriptions of incidents (some of which did not involve Gunz Up and others in which the shooter was unknown) to substantial evidence that Gunz Up's primary activity was the commission of specified crimes. Thus, the issue

boils down to whether the detective's more specific testimony explaining Gunz Up gang member Dionte Brown's possession of a concealed weapon and/or residential burglary on December 9, 2008, is sufficient evidence to sustain the gang enhancement.

Detective Saario, unlike his counterparts in *Nathaniel C., supra*, 228 Cal.App.3d 990 and *Alexander L., supra*, 149 Cal.App.4th 605, did testify that Gunz Up's primary activities included "residential burglaries, weapons possessions, shootings, and assault with a deadly weapon using firearms . . . ." Specifically, he described the incident involving Dionte Brown on December 9, 2008. On that date, undercover police officers observed Brown driving a stolen vehicle. Officers in a marked police car stopped the car, and when Brown stood, a Glock nine-millimeter handgun fell out of his waistband. He was in the company of Marquis Johnson, who was later killed in another gang shooting. Brown admitted burglarizing a home to steal the gun.

Possession of a concealed and/or loaded firearm and residential burglary are offenses listed in Penal Code section 186.22, subdivision (e). Either one therefore satisfies the prosecution's burden to prove that one of the primary activities of the gang is the commission of an enumerated offense. To establish his credentials as an expert in the area of African-American gangs, Detective Saario testified at trial that he was familiar with the Gunz Up gang through talking to members of that gang, talking to gang members who are rivals of Gunz Up, investigating crimes involving Gunz Up members, talking to outside agencies, and through utilizing social media. Thus, we can infer that he learned about the Brown incident through his investigation of crimes involving Gunz Up and his conversations with gang members and other police officers. We reject defendant's notion that the expert needed to further describe the details surrounding the residential burglary. It was enough that Brown broke into the house to steal a firearm.

Defendant complains that Detective Saario did not testify the firearm was unlawfully possessed because Brown was a convicted felon. But Penal Code section 186.22, subdivision (e) refers to a concealed or a loaded firearm; it does not include a

requirement that the person in possession of the firearm be a convicted felon. The fact that Brown was concealing his loaded Glock nine-millimeter handgun in his waistband was sufficient to satisfy the statute. Thus, there is substantial evidence to support a finding that the primary activities of Gunz Up included residential burglary and weapons possession.

Defendant correctly points out that the prosecution must prove at least two predicate offenses in order to prove the requisite pattern of criminal gang activity, and he acknowledges that the charged offense can count as one of the two offenses. But he objects to the Attorney General's use of the attempted murder conviction because Detective Saario did not identify attempted murder as one of the gang's primary activities. As mentioned above, he confuses two distinct elements of a gang enhancement. We agree with the Attorney General that neither the testimony nor the instruction pertaining to "primary activities" limits the proof of a pattern of criminal gang activity. Penal Code section 186.22 does not require that the two predicate offenses used to establish a "pattern of criminal gang activity" under subdivision (e) be the same as the crimes constituting the gang's "primary activities" under subdivision (f). The statute simply requires that the criminal acts relied on to satisfy both the "primary activities" element and the "pattern of criminal gang activity" element be among those enumerated in Penal Code section 186.22, subdivision (e). (See Pen. Code, § 186.22, subd. (e).)

The question thus presented is whether there is substantial evidence of at least two qualifying predicate offenses. We must conclude there is. The Brown incident as already discussed counts as one of the offenses, and the attempted murder counts as another. While we agree with defendant that the vast majority of the gang expert's testimony did not establish a pattern of criminal gang activity due to a host of infirmities, there is substantial evidence that one Gunz Up member, Dionne Brown, was involved in a residential burglary and that defendant was at least involved in the shooting of Winters.

Gang Conduct that Occurred After the Nedra Court Shooting

Defendant next objects to the prosecutor's utilization of shootings that occurred after the Nedra Court shooting on September 15, 2009, to support the gang enhancement. The record supports defendant's assertion that at trial and throughout his argument, the prosecutor pointed to evidence of a two-year "war" between rival gangs. And defendant rebutted this exaggerated portrayal of the role of Gunz Up in general, and his role in particular, throughout the trial and in his closing argument. There was absolutely no evidence that he was involved in any of the 25 other shootings the prosecution presented, and indeed, Gunz Up was characterized as the aggressor in only three of them. The law is clear that evidence of conduct occurring after the charged incident cannot be used to prove a pattern of gang activity. Nevertheless, despite the fog of war the prosecutor may have created by his emphasis on shootings that did not involve defendant, the majority of which occurred after one shooting in which he was involved, the record does not support defendant's argument that the prosecutor relied on the later shootings to prove the gang enhancement.

Indeed, the prosecutor peppered his closing argument with references to the so-called war that preceded and succeeded the Nedra Court shooting. But defendant's citations to various portions of the closing argument do not support his claim that the prosecutor relied on any of the post-September 15 shootings to prove the pattern of criminal activity. Rather, the prosecutor used the war analogy to support his broader theory that both defendants were involved in mutual combat as warriors in the bitter battles that erupted between the two factions. The references were not, as defendant argues, in the context of proving the gang enhancement. Hence his argument must fail.

Failure to Instruct on Elements of the Predicate Offenses Constitutes Harmless Error

Defendant contends the trial court had a sua sponte obligation to instruct the jury on the elements of the predicate offenses, which constitute a pattern of criminal gang

activity. The predicate offenses can be shown either by proving their "commission [or] attempted commission" or by proof of a prior conviction. (Pen. Code, § 186.22, subd. (e).) The prosecution sought to prove the predicate offenses by proving their commission, not by proof of prior convictions. Defendant argues that where proof is of the commission or attempted commission of those offenses, the jury must be instructed on the elements of the crimes so that it can determine whether they were committed.

We agree that defendant's analogy to a criminal conspiracy is apt. A trial court has a sua sponte obligation to instruct on the elements of an offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238-1239; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706.) Similarly, the elements of a predicate offense, like a target offense, are necessary to proof of the charge of a gang enhancement, similar to a conspiracy. Since a court has a sua sponte obligation to instruct on all elements of an offense, the court should have instructed on the elements of the predicate offenses, which were part and parcel of the gang enhancement. The failure to do so violated defendant's federal and state constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 15 & 16.)

Nevertheless, we conclude the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].) With or without the instruction, a jury would have concluded beyond a reasonable doubt that Gunz Up is a criminal street gang. Defendant did not present any evidence at trial, and does not point to any on appeal, to contest any of the elements of residential burglary or weapons possession. By contrast, the prosecution's gang expert testified that Dionne Brown had committed both offenses. In the absence of a scintilla of evidence to cast doubt on a single element of the predicate offenses, we find the failure to instruct harmless.

IV

Correction of Abstract and Modification of Presentence Custody Credits

Defendant was incarcerated in the county jail from the date of his arrest on February 2, 2010, through the date of his sentencing on June 15, 2012. The parties agree that defendant should have been awarded 865 days of actual custody credits and 129 days of conduct credit, for a total of 994 days' credit. The trial court only awarded 864 days of actual time. Thus, the total number of days' credit should be increased from 993 to 994 days of presentence credit.

The parties also agree that the abstract of judgment incorrectly states the date of his conviction as September 15, 2009, when the true date of conviction was April 12, 2012. The abstract of judgment should be corrected accordingly.

V

Senate Bill 620

As earlier noted, on October 11, 2017, nine days before issuance of the remittitur, the Governor signed Senate Bill 620 (Stats. 2017, ch. 682, §§ 1 & 2). As relevant to this case, Senate Bill 620 amends Penal Code section 12022.53 to give discretion to the trial court to strike a firearm enhancement in the interest of justice. Section 12022.53 was amended by Senate Bill 620 to add the following language:

"(h) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Defendant sought, and we issued, an order recalling the remittitur to permit the parties to provide supplemental briefs on the applicability of the amended statute to this appeal. In his supplemental brief, defendant argues he is entitled to a new sentencing hearing to give the trial court an opportunity to exercise discretion to strike the personal and principal firearm use and discharge findings in connection with count one, imposed

pursuant to Penal Code section 12022.53, subdivisions (b), (c), (d), and (e), and Penal Code section 12022.5, subdivision (a). The People agree and "respectfully request that this Court remand appellant's case for the limited purpose of permitting the superior court to exercise its discretion as to whether or not to strike the Penal Code section 12022.5 and 12022.53 firearm enhancements found true by the jury." We accept the People's concession.

DISPOSITION

The sentence is vacated. The matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h). The trial court is directed to add an additional day of custody credit for a total of 994 days of presentence credit, to amend the abstract of judgment to reflect the date of conviction as April 12, 2012, and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

MAURO, J.